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Supreme Court, U.S.
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NO. 99-1583

IN THE
SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

D.M.,
Respondent

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On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

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# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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15 pp

## QUESTION PRESENTED

1. Does this Court lack jurisdiction to consider the ruling of the Pennsylvania Supreme Court in this case, where that Court's decision was based solely upon its interpretation of *Terry v. Ohio*, and nothing even remotely resembling a plain statement of an independent state law basis for the decision appears anywhere in the state court opinion?

2. Is the Pennsylvania Supreme Court's preliminary holding about an anonymous "man with a gun" tip dispositive, where the state court then went on to hold, erroneously, that flight is "not relevant" in assessing reasonable suspicion for *Terry* stops?

3. May respondent avoid the inescapable effect of *Wardlow* on the Pennsylvania Supreme Court's flight analysis by simply inventing an alternate state law basis for the decision in this case that was not a part of the state court's reasoning and was never at issue?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii-iv |
| Reasons for Granting the Writ | |
| 1. This Court has jurisdiction: the state court never asserted an independent state ground, and expressly relied on *Terry*. | 1-4 |
| 2. Respondent's suggestion that *J.L.* is dispositive in this case ignores the additional factor of flight, which this Court, in *Wardlow*, has deemed to be a significant factor in determining the existence of reasonable suspicion. | 4-6 |
| 3. The Pennsylvania Supreme Court never held that respondent was seized before he fled from police; this blatantly false assertion can only be construed as a tacit concession that the state court decision in this case is incompatible with this Court's decision in *Wardlow*. | 6-10 |
| Conclusion | 10 |

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| **Federal Cases** | |
| Arizona v. Evans, 514 U.S. 1 (1995) | 2 |
| California v. Hodari D., 499 U.S. 621 (1991) | 7 |
| Florida v. J.L., No. 98-1993, 2000 U.S. LEXIS 2345 (decided March 28, 2000) | 1,4,5,9 |
| Florida v. Rodriguez, 469 U.S. 1 (1984) | 8 |
| Illinois v. Wardlow, No. 98-1036, 2000 U.S. LEXIS 504 (decided January 12, 2000) | 1,4,6,9 |
| Michigan v. Long, 463 U.S. 1032 (1983) | 1,2 |
| Pennsylvania v. Labron, 518 U.S. 938 (1996) | 3 |
| Terry v. Ohio, 392 U.S. 1 (1968) | *passim* |
| United States v. Angell, 11 F.3d 806 (8th Cir. 1993), *cert. denied*, 512 U.S. 1239 (1994) | 8 |
| United States v. Moreno, 897 F.2d 26 (2nd Cir. 1990), *cert. denied*, 497 U.S. 1009 (1990) | 8 |

**PAGE**

**State Cases**

Commonwealth v. Cook, 558 Pa. 50, 735 A.2d 673 (1999) 3,4

Commonwealth v. Hall, 475 Pa. 482, 380 A.2d 1238 (1977) 8

Commonwealth v. Hicks, 434 Pa. 153, 253 A.2d 276 (1969) 4

Commonwealth v. Jackson, 548 Pa. 484, 698 A.2d 571 (1997) 3,4

Commonwealth v. Jeffries, 454 Pa. 320, 311 A.2d 914 (1973) 7

Commonwealth v. Jones, 474 Pa. 364, 378 A.2d 835 (1977), *cert. denied*, 435 U.S. 947 (1978) 8

Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (1996) 7,8

## REASONS FOR GRANTING THE WRIT

Respondent asserts three reasons for denying the writ. First, he claims that the state court decided this case under the state constitution. Second, he argues that the issue presented has already been decided by this Court and thus review is unwarranted here. Finally, he attempts to mislead this Court as to the nature of the state court's holding in an attempt to reconcile this case with this Court's decision in *Wardlow*. Respondent's first argument is simply incorrect; his second ignores the crucial factor which distinguishes this case from *J.L.*; and his third argument is based upon a completely false representation concerning what the state court held in this case. The state court's actual holding is insupportable under this Court's recent decision in *Wardlow*.

### 1. This Court has jurisdiction: the state court never asserted an independent state ground, and expressly relied on *Terry*.

Respondent asserts that this Court should not grant review in this case because the Pennsylvania Supreme Court's decision was "grounded" on the state constitution and not federal law. Wholly lacking in respondent's protracted jurisdictional argument is any acknowledgment of the controlling principles under which this determination is to be made. If respondent were correct, however, he would not need any extended discussion of the issue; he would simply be able to point to a plain statement by the state court that its decision was exclusively based upon state law.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted the following test for determining whether a state court decision rests upon an adequate and independent state law ground:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used for the purposes of guidance, and do not themselves compel the result that the court reached.

*Id.*, 463 U.S. at 1040-1041. *See also Arizona v. Evans*, 514 U.S. 1, 7-10 (1995).

Despite this Court's clearly articulated jurisdictional standard, respondent does not claim a "plain statement." In fact, he carefully avoids mention of any form of those words. Respondent's failure to identify the necessary statement (or even to acknowledge the requirement for one) is hardly accidental. There is no statement, plain or otherwise, placing the state court's holding on independent state grounds.

Indeed, a review of the Pennsylvania Supreme Court's opinion reveals the opposite to be true. Contrary to respondent's representations, the "sole issue" presented in the case was whether police had reasonable suspicion to stop respondent. App. 1. In deciding this issue, the Pennsylvania Supreme Court expressly relied upon this Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which was described in its opinion as "the seminal case on reasonable suspicion." App. 4. The state court went on to explicitly declare: "In

determining whether reasonable suspicion exists for a *Terry* stop, **the inquiry is the same** under Article I, Section 8 of the Pennsylvania Constitution or the Fourth Amendment of the United States Constitution." *Id.* (emphasis added). Thus, the only plain statement provided by the Pennsylvania Supreme Court was that it is relying on federal law to resolve the sole issue presented in the case.[1]

In the face of the Pennsylvania Supreme Court's explicit declaration that it was following *Terry*, respondent attempts to create a state court basis for the decision in this case by asserting that in other cases, which were cited in this case, the court had an independent state law ground for its decision. Respondent's point is a total non-sequitur. For purposes of jurisdiction, to assert that a state court relied on an independent state ground in **other cases** is simply meaningless.[2]

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[1] The Pennsylvania Supreme Court knows how to state an independent state ground. Indeed, this Court recently reiterated the concept directly to that court. In *Pennsylvania v. Labron*, 518 U.S. 938 (1996), the main argument of the respondent was jurisdictional; the state court, he claimed, relied on the state constitution. This Court rejected that argument. Although it referred to state jurisprudence, the state court had made no "plain statement" that its numerous citations to federal authority were "being used only for the purpose of guidance, and d[id] not themselves compel the result[.]" 518 U.S. at 940-41. *Labron* was decided on July 1, 1996, over three years before the state court decided the instant case on December 27, 1999. The Pennsylvania Supreme Court, therefore, obviously knows by now how to articulate an independent state ground. Yet it did not do so here.

[2] Respondent finds it significant that, in addition to *Terry*, the state court relied upon its own decisions in *Commonwealth v. Jackson*, 548 Pa. 484, 698 A.2d 571 (1997) and *Commonwealth v. Cook*, 558 Pa. 50, 735 A.2d 673 (1999). The decisions in both

Jurisdiction is not in issue here.

**2. Respondent's suggestion that *J.L.* is dispositive in this case ignores the additional factor of flight, which this Court, in *Wardlow*, has deemed to be a significant factor in determining the existence of reasonable suspicion.**

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*Cook* and *Jackson*, however, both reiterate the Pennsylvania Supreme Court's long expressed position that for purposes of state constitutional law the reasonable suspicion standard is the same as that under the Fourth Amendment -- *Terry* is the standard. Thus, in *Cook*, the Court expressly noted that it adopted the *Terry* standard in *Commonwealth v. Hicks*, 434 Pa. 153, 253 A.2d 276 (1969) and has "consistently followed *Terry* in stop and frisk cases, including those arising under Article I, § 8 of the Pennsylvania Constitution." 735 A.2d at 676-677. The same pronouncement was also made by the Court in *Jackson*. 698 A.2d at 573. These cases further illustrate that the state court decision in this case was based upon *Terry* and not some unspecified state law ground.

Respondent also refers to cases in which the Pennsylvania Supreme Court has adopted a different standard for determining whether a seizure has occurred under state law in cases of "coerced abandonment," and he argues that those cases are consistent with the state court's decision in this case. As will be more fully discussed in response to respondent's third argument, there was no issue of "coerced abandonment" in this case. Respondent never abandoned the gun he was carrying; it was seized when he was stopped by the police officer. The Pennsylvania Supreme Court never held, as is falsely represented to this Court, that respondent was seized before he fled from police. This was not an issue in the case, nor was it ever argued in the Common Pleas or Superior Court. The only issue presented to the state courts was whether reasonable suspicion was established under *Terry* by the combination of the anonymous tip of a "man with a gun" and respondent's flight from police.

Still clinging to his fictional claim that this case was decided on state law grounds, respondent finally gets around to mentioning this Court's recent decision in *Florida v. J.L.*, No. 98-1993, 2000 U.S. LEXIS 2345 (decided March 28, 2000) on page eight of his brief in opposition to the petition for writ of certiorari. Indeed, respondent's sparse reference to *J.L.* serves only to refute his contention that the Pennsylvania Supreme Court's decision in this case is "entirely consistent" with *J.L.* (Respondent's brief, 9).

Petitioner acknowledges that the first reason set forth in its petition for requesting review by this Court, that an anonymous tip of a "man with a gun" would alone be an adequate basis for a *Terry* stop, is no longer tenable in light of *J.L.*. However, the resolution of this issue is not dispositive of this case.[3] Petitioner's second reason for requesting this Court to grant a writ of certiorari in this case remains both viable and compelling. The Pennsylvania Supreme Court held that flight, a factor this Court considers to be significant in determining the existence of reasonable suspicion, is irrelevant unless first preceded by other suspicious conduct. Thus, in Pennsylvania, police are not allowed to consider a suspect's flight to be a significant factor under *Terry* unless

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[3] The suspect in *J.L.* was stopped solely on the basis of his matching the description provided in an anonymous tip. Respondent in this case, however, was stopped not just on the basis of a tip, but only after he ran away when the police officer investigating the tip tried to speak to him. This crucial element of flight, which was not present in *J.L.*, was erroneously dismissed by the state court as irrelevant under *Terry*. Here, the combined circumstances of the anonymous tip, respondent's matching the tip's description at the exact location reported, and his highly suspicious flight when the officer spoke to him clearly established the requisite reasonable suspicion under *Terry*. This case, therefore, is fundamentally different from *J.L.*.

they already have observed independently suspicious conduct. Of course, if they have already observed other suspicious conduct, the flight would be superfluous.

The flight in response to the police officer's presence, as this Court recently made clear in *Illinois v. Wardlow*, No. 98-1036, 2000 U.S. LEXIS 504 (decided January 12, 2000), was suspicious conduct by respondent that the officer was entitled to rely upon in deciding to make a *Terry* stop. Under *Wardlow*, therefore, flight, standing alone, is a significant factor in determining the existence of reasonable suspicion under *Terry*. In this case, however, the Pennsylvania Supreme Court reached the opposite conclusion and held that flight is irrelevant under *Terry* unless it is preceded by some other suspicious behavior. The reasoning of the state court in this case is clearly in conflict with *Wardlow* and should not be permitted to stand.

**3. The Pennsylvania Supreme Court never held that respondent was seized before he fled from police; this blatantly false assertion can only be construed as a tacit concession that the state court decision in this case is incompatible with this Court's decision in *Wardlow*.**

Respondent, in an effort to avoid the inescapable conclusion that *Wardlow* renders the state court decision in this case wholly invalid, manufactures a new holding for the case, based on an issue never raised nor addressed by the state court, and which simply has nothing to do with this case. Petitioner falsely represents that "the Pennsylvania Supreme Court determined that, under Article I, § 8, an unjustified seizure had already occurred prior to the flight." (Respondent's brief, 10). There was no such holding in this case. The Pennsylvania Supreme Court did not even imply that a

seizure had occurred prior to respondent's flight, let alone explicitly hold so.

Equally puzzling is respondent's assertion that the Pennsylvania Supreme Court's rejection of flight as a relevant factor under *Terry* is somehow consistent with the court's state law "coerced abandonment" decisions in *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769 (1996);[4] and *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). There was no abandonment by respondent of his gun in this case -- let alone any coerced abandonment. Nor was there any issue presented to the state courts other than the existence of reasonable suspicion to support the stop of respondent. Tellingly, despite respondent's insistence that *Matos* and *Jeffries* support the phantom holding he has constructed, the Pennsylvania Supreme Court did not cite to either of these cases in its opinion here. These cases lend no support whatsoever to the court's actual holding that respondent's flight in this case was irrelevant under *Terry*.[5]

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[4] In *Matos*, the Pennsylvania Supreme Court rejected this Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991) and held under state law that police pursuit of a fleeing suspect is a seizure, which must be supported by probable cause or reasonable suspicion to allow police to retrieve contraband that has been discarded by the fleeing suspect. Here, of course, respondent's flight preceded the police pursuit and, thus, under state law he could not have been seized until after he fled. Thus, there was no issue in this case as to whether respondent was seized prior to his flight, and all three state courts addressed the issue of flight in determining whether reasonable suspicion was established to stop respondent. There was no issue litigated, at any stage of the state court proceedings in this case, regarding when the seizure occurred.

[5] Respondent claims that he was illegally seized "by the officers' authority and their command to Respondent to stop and

The Pennsylvania Supreme Court unquestionably

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submit to their investigation" (Respondent's brief, 11). This assertion misstates the facts of this case. The only words spoken by the officer were "come here." App. 2; App. 20; App. 33. There was no command to stop and submit to investigation, as respondent claims. The officer arrived on the scene and simply said, "come here;" in response, respondent fled. Indeed, respondent never argued in the state courts that he was unlawfully seized when the officer asked him to "come here," and the Pennsylvania Supreme Court never addressed any such notion.

In any event, under even Pennsylvania law a police officer may "initiate an encounter with a suspect and request information absent any level of suspicion...." *Commonwealth v. Matos*, 543 Pa. 449, 461, 672 A.2d 769 (1996). "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Commonwealth v. Hall*, 475 Pa. 482, 488, 380 A.2d 1238 (1977). Obviously, the officer had to say something if he wished to talk to respondent. The officer's mere use of the words "come here" to convey that request did not constitute a seizure. Absent an "exercise of force," there is no seizure. *Commonwealth v. Jones*, 474 Pa. 364, 372, 378 A.2d 835 (1977), *cert. denied*, 435 U.S. 947 (1978). *Accord Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984)("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); *United States v. Angell*, 11 F.3d 806, 809-810 (8th Cir. 1993), *cert. denied*, 512 U.S. 1239 (1994)(no seizure occurred where police officer shined flashlight on occupants of vehicle stopped at stop sign and said, "Stay there, I want to talk to you"); *United States v. Moreno*, 897 F.2d 26, 30-31 (2nd Cir. 1990), *cert. denied*, 497 U.S. 1009 (1990) (no seizure where law enforcement agents approached appellant, displayed badge, and said, "come over here for a second"). Thus, in addition to being a non-existent issue in the case, respondent's fabricated state law rationale is an incorrect statement of Pennsylvania law as well.

considered whether flight was an "'additional' factor" in determining the existence of reasonable suspicion, but found it to be irrelevant because the flight was not preceded by other suspicious conduct on respondent's part. *See* App. 6-7. This holding cannot be reconciled with this Court's decision in *Wardlow*. The only suspicious conduct observed by police in *Wardlow* was flight.[6] That combined with Wardlow's mere presence in a high crime area was deemed by this Court to meet the reasonable suspicion standard of *Terry*.

Respondent's attempt to distinguish *Wardlow* from this case by asserting that the flight in *Wardlow* was unprovoked, while respondent's flight was provoked by police, is based on his fabricated notion that he was seized prior to his flight and, for this reason alone, fails outright. Both respondent and Wardlow fled for the same reason: to avoid scrutiny by the police. In this sense, flight was provoked by the

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[6] Respondent simply fails to confront the fact that the police had no reason to suspect Wardlow of any wrongdoing before they saw him flee, and that such flight could support a finding of reasonable suspicion. Here, there was even more: the police had information from an anonymous source that respondent had a gun. While this tip was not enough by itself for a stop, respondent's flight certainly provided corroboration for the anonymous tip. Respondent's immediate flight suggests that he knew that he had given reason for persons to know he was armed: police were not there by coincidence. By taking flight at the arrival of police, respondent exhibited the kind of corroborative, suspicious conduct that was absent in *J.L.* The fact that there was no evidence that respondent was in a high crime area is not significant. That was the only other factor present in *Wardlow*. Here, by contrast, the police had specific information -- albeit from an anonymous source -- that respondent was carrying a concealed weapon on a public street. His highly suspicious flight served to confirm the anonymous tip. If anything, the police in this case had a stronger basis for a *Terry* stop than the officers in *Wardlow*.

presence of the police and a desire not to have illegal conduct detected. This, however, is precisely why the flight is such a significant factor in the determination of reasonable suspicion. When police drive down a street, or approach a person to ask a question, and their presence is met with headlong flight, it is entirely reasonable for them to draw the conclusion that the flight is suspicious. Thus, when the officer in this case attempted to speak with respondent about the anonymous gun tip and respondent immediately ran away, it was reasonable for the officer to conclude that he was warranted in conducting a *Terry* stop.

The Pennsylvania Supreme Court's pronouncement that, under *Terry*, flight cannot be considered until police have observed other suspicious conduct is an erroneous interpretation of federal constitutional law. This decision, moreover, essentially prevents police officers in Pennsylvania from giving meaningful consideration to a suspect's sudden flight in determining whether to make a stop under *Terry*, despite this Court's unequivocal pronouncement that flight is a highly relevant factor in the *Terry* analysis.

The writ should therefore be granted.

## CONCLUSION

Wherefore, the Commonwealth of Pennsylvania respectfully requests this Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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